Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1497

WILLIAM SCOTT and RONALD KINDRED,
Appellants,

vs.

THE STATE OF CALIFORNIA,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

JURISDICTIONAL STATEMENT

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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
The questions are substantial	8

Table of Authorities Cited

Cases

	Pages
Rathbun v. United States (1957) 335 U.S. 197	9

Codes

California Evidence Code:	
Section 250	9
California Penal Code:	
Section 630	6
Section 632	3, 8, 10
18 U.S.C., Section 2511(d)	8
28 U.S.C., Section 1257(2)	2

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Appellants appeal from the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered on January 13, 1975, and the decision of the Supreme Court of the State of California denying a hearing in the within matter entered on March 12, 1975, affirming the judgment of conviction of Appellants, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, was certified for nonpublication and is not reported. Copies of the said opinion are attached hereto as Appendix A.

JURISDICTION

On June 20, 1973, Appellants and one Cawley were convicted of the crimes of forgery, conspiracy to commit forgery, and possession of a completed instrument with intent to defraud, in the Superior Court of the State of California in and for the County of San Mateo. On October 4, 1973, Notice of Appeal to the Court of Appeal of the State of California, First Appellate District, Division Four, was filed by Appellants. The judgment of the said Court of Appeal affirming Appellants' conviction was filed on January 13, 1975, and the order of the Supreme Court of the State of California denying a hearing in Appellants' case was filed on March 12, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

QUESTION PRESENTED

The question presented in this appeal is whether criminal defendants can constitutionally be denied the right to present relevant and material evidence of their innocence in the form of a tape recorded state-

ment incriminating a police informer because such tape recorded statement was obtained without the consent of the police informer in violation of California Penal Code Section 632 which prohibits the use in evidence of confidential telephone communications recorded without the consent of all parties to the communication.

STATUTES INVOLVED

California Penal Code Section 632 is set forth in Appendix C hereto.

STATEMENT

On January 12, 1973, Appellants were coroner's investigators employed by the Coroners Office of the County of San Mateo, State of California. On the said date, the body of one Samuel Yeary was found in Yeary's car in a parking lot in the City of South San Francisco in said County, Yeary having apparently died of a heart attack. Appellant Kindred and one Peter Durigan, an ambulance driver engaged in body removal, removed Yeary's body to the morgue. On January 16, 1973, a cashier's check payable to Samuel Yeary in the amount of $500.00 was deposited by an unknown person in the savings account of Appellant Scott, using Scott's passbook. The check had only a typewritten endorsement, and the teller who received the deposit could not recall the transaction or identify the depositor.

The principal witness for the prosecution was the ambulance driver, Peter Durigan. Durigan testified that some time after the Yeary body had been brought to the morgue, Appellant Kindred approached him in the parking area, showed him the $500.00 cashier's check which he said he had found on Yeary's body, and asked Durigan to cash the check by forging Yeary's endorsement. (Durigan had a prior criminal record for bad checks).

Durigan testified that he took the check home with him intending to cash it, but changed his mind when his wife disapproved. Durigan testified that he called Appellant Kindred and told him he could not cash the check, and that Appellant Kindred and Appellant Scott came to his home and picked up the check saying that Scott intended to cash it at the San Francisco Airport. Durigan further testified that Scott later told him he intended to deposit the check in his (Scott's) savings account.

Durigan testified that a couple of days later, at his wife's insistence, he called Inspector Smith of the San Mateo County District Attorney's Office and later went to the District Attorney's Office where he told the Inspector what had happened and at the Inspector's suggestion, made calls to Appellants Kindred and Scott. Inspector Smith allegedly tape recorded all of these telephone conversations, but the conversation with Appellant Scott was not recorded ostensibly due to a malfunction of the tape machine. According to Durigan and Inspector Smith, Appellant Scott was supposed to have told Durigan that he

had deposited the cashier's check in his savings account and that when he asked Scott if he had signed his name on the back of the check, Scott told him he had. It was conceded by the District Attorney and Inspector Smith that the reasons originally given to the grand jury for the malfunction of the tape recorder were false, and there was great dispute as to whether there had actually been a malfunction of the tape machine at all.

Durigan further testified that several days later he saw Appellant Scott at the County Hospital and Scott told him that he had deposited the check in his savings account and showed him the bank book with the deposit. Durigan then allegedly told Scott that he had informed on him and Appellant Kindred to the District Attorney's Office and further informed him about the recorded telephone messages. According to Durigan, Scott told him that he was going to say he had lost his book, and Scott then burned the passbook in Durigan's presence in the furnace at the County Hospital.

Durigan was severely impeached concerning his whereabouts on the day Yeary's body was found and also in regard to the fact that Appellant Kindred is supposed to have told him that the cashier's check had been found in Yeary's sock. A fingerprint expert called by the People testified that the check in question could never have been in contact with anyone's foot. Durigan further testified that he had not been prosecuted for his part in the offense and that he had testified before the grand jury that if he had

been indicted, he would have denied everything he had said concerning the case. Durigan admitted that he had free access to the office where the typewriter which had been used to endorse the Yeary check was located, and further testified that the purported verbatim transcript of the unrecorded Scott phone call introduced by the People was *not* a fair and accurate recounting of the conversation.

The various tape recordings between Durigan, Appellant Kindred and a co-defendant Cawley were admitted into evidence and played for the jury.

After laying a foundation that a later tape recording between Durigan and co-defendant Cawley made by Cawley the night Durigan testified before the grand jury was fair and accurate, the tape recording was offered by the defendants. The court ruled that the tape could not be admitted in evidence because it had been illegally recorded in violation of Section 630 of the California Penal Code since the recording had been made without the knowledge or permission of Durigan. The trial court refused even to hear defendant's offer of proof as to the contents of the tape recording. The court, however, did allow co-defendant Cawley to testify as to the substance of the conversation, and it was shown that the tape contained evidence that Durigan himself could have been the person who deposited the check in Appellant Scott's bank account. Durigan had testified that he was not acquainted with any of the tellers at the savings and loan in which the check was deposited, that he did not know the teller who had accepted the deposit, had never met her, and could

not even identify her. Defendant Cawley testified that during his tape recorded conversation, Durigan, although he was not supposed to know the teller, had recognized her as soon as she entered the hallway outside of the courtroom. Further efforts to introduce the tape recording were likewise denied by the court. Appellants objected that the trial court's action was a denial of constitutional due process of law.

Appellants and their co-defendant each testified in his own behalf, denying all of the charges. Appellant Scott admitted that he had received a telephone call from Peter Durigan and that Durigan had asked him if he had cashed a check. Appellant Scott told Durigan that he had either cashed or deposited the check and believed that Durigan had been referring to a check which Scott had received from flying ashes out to sea. Appellant Scott further testified that at the time the check was deposited in his account, he had been in another city with other persons. Scott further testified that the last time he had seen his savings passbook was the previous summer but that Durigan had access to his passbook as a visitor to his home and to his office.

Appellants and their co-defendant Cawley were convicted of forgery, conspiracy to commit forgery and possession of a completed check with intent to defraud. The District Court of Appeal of the State of California reversed the conviction as to defendant Cawley based upon various errors of the trial court, but refused to reverse the conviction as to Appellants. The District Court ignored the constitutional question

of due process which was raised in both the trial court and before the District Court by assignment of error (Reporter's Transcript 930-931; Appellants' Opening Brief pp. 33-35; Appellants' Reply Brief, pp. 5-8; Appellants' petition for hearing in California Supreme Court pp. 2-6), but impliedly upheld the constitutionality of Penal Code Section 632 by finding that the tape recording should have been admitted because it was not a confidential communication.

THE QUESTIONS ARE SUBSTANTIAL

As far as can be determined, this is the first case to come before the courts which deals with the constitutionality of a State law prohibiting a criminal defendant from introducing relevant, material evidence of his innocence because of the manner in which that evidence was procured and the first case to deal with the applicability of anti-wiretap statutes to criminal defendants. 18 U.S.C. §2511(d) is the Federal statute analogous to California Penal Code Section 632. This Section specifically exempts from the wire-tap statutes recordings made with consent of *one* party to the conversation. Apparently the difference between the Federal statute and the California statute are due to a recognition by Congress of the constitutional questions involved in prohibiting a criminal defendant from using telephone conversations recorded by him in evidence at his trial.

Tape recordings, of course, are not simply corroborative evidence, they are in themselves evidence.

Section 250 of the California Evidence Code makes them the best evidence of a conversation. If the California statute is constitutional, then criminal defendants are deprived of a powerful tool which the prosecution is free to use at will, (the California statute exempts law enforcement officers). In the instant case, the prosecution's tape recorded conversations of the informant and the Appellants were freely admitted into evidence while the Appellants' tape recordings which contain substantive evidence that the informant himself may have committed the crime were rejected as having been illegally obtained. No other case could be found in which evidence obtained by a private individual was denied admission because it was illegally obtained.

In *Rathbun v. United States* (1957) 335 U.S. 197, this court recognized that a person has a *right* to record his own telephone conversations. It is a denial of due process to allow the police to use in evidence tape recorded conversations with the consent of one party but to deny this right to the defendants, in a criminal action. In these days of electronic and other technological "miracles", the courts should require a strong showing before an individual can constitutionally be denied the right to use such technological advances in the gathering of evidence to support his criminal defense. While a restriction on such obviously pernicious activities as wire tapping is clearly reasonable, a restriction upon the ordinarily benign act of recording one's own telephone conversations should not be restricted, and such restriction is a denial of due process of the law under the Constitution of the

United States. The provisions of California Penal Code Section 632 which prevent a criminal defendant from using in evidence at his trial tape recordings of telephone calls made to him are invalid as repugnant to the due process provisions of the Constitution of the United States, and the convictions herein should be reversed.

Dated, Millbrae, California,
May 20, 1975.

CLARENCE B. KNIGHT,
Attorney for Appellants.

(Appendices Follow)